Supreme Court, U.S.
FILED

No. 06-864

DEC - 8 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

RABIUL ISLAM,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro Se

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QUESTIONS PRESENTED FOR REVIEW

A. SHOULD THE IMMIGRATION JUDGE BE REQUIRED TO GRANT A CONTINUANCE WHERE THE IMMIGRANT LITIGANT CAN SHOW THAT HIS/HER OWN LACK OF PREPAREDNESS IS DUE TO THE UNITED STATES DEPARTMENT OF LABOR'S PROCESSING DELAY?

B. SHOULD THE IMMIGRATION JUDGE BE ALLOWED TO ORDER AN IMMIGRANT'S REMOVAL WHEN THE UNDERLYING APPLICATION FOR RELIEF FROM DEPORTATION/REMOVAL IS BASED ON THE UNITED STATES' GOVERNMENTAL DELAY?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 5

SUMMARY OF THE ARGUMENTS 8

Adjustment of Status Versus the Ten Year Bar Penalty 8

The Life Act Offers Protection from the Ten Year Bar 10

ARGUMENTS 11

I have always given my best efforts to always follow the immigration laws Compliance with *Call-in Special Registration* and Prosecutorial Discretion Favored the Issuance of a Continuance in my case 11

My compliance with *Call-in Special Registration*, resulted in disparate impact on my case 12

I was the victim of an attorney who violated legal and ethical boundaries 14

I am aware that another U.S. Circuit Court of Appeals reviewed this type of issue and decided in favor of the immigrant litigant 15

CONCLUSION 16

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

Hassan v. INS,
110 F.3d 490 (7th Cir. 1997) 16

Onyeme v. INS,
146 F.3d 227 (4th Cir. 1998) 16

Subhan v. Ashcroft,
383 F.3d 591 (3d Cir. 2005) 11, 15

STATUTES

8 U.S.C. § 1182(a)(9)(B)(i)(II) 9

8 U.S.C. § 1252(a)(1) 8

8 U.S.C. § 1255 ..... 1, 5, 8, 9

8 U.S.C. § 1255(i) ..... *passim*

28 U.S.C. § 1254 1

INA § 101(a)(15) 7

INA § 237(a)(1)(B) 6

INA § 245(i) 7, 12, 13

OTHER AUTHORITIES

67 Fed. Reg. 77136 (2002) 11

Cainkar, Louise, Ph.D.,
Special Registration: A Fervor for Muslims, 7 *J. Islamic L. & Culture* 73, 99.....15

H.R. Conf. Rep. 104-828, 104th Cong. 2d Sess. 9

Memo, Crocetti, Assoc. Comm.
INS, HQ 5015.12, 96 Act .034 (May 1, 1997).....9

Kurzban, Ira J.,
Immigration Law Sourcebook (American Immigration Law Foundation 9th ed. 2004-2005) 9

Pub. L. No. 107-296, Title IV,
Subtitles C-F, 116 Stat. 2135 (Nov. 25, 2002).....6

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Rabiul Islam v. Alberto R. Gonzales*, F.4th (2006), is an unpublished opinion. (No. 05-2099) (4th Cir.). The United States Court of Appeals for the Fourth Circuit entered judgment on June 29, 2006. On September 11, 2006, the United States Court of Appeals for the Fourth Circuit filed the order denying the Petition for Rehearing and Rehearing En Banc.

JURISDICTIONAL STATEMENT

Jurisdiction to review this petition is conferred by 28 U.S.C. § 1254. The petition is being filed within ninety (90) days of the date of the decision of the case on appeal made by the United States Court of Appeals for the Fourth Circuit.

STATUTORY PROVISIONS

The very basic opportunity to avail oneself of Immigration statute 8 U.S.C. § 1255 is at issue.

Please *see* the statute's relevant portion (8 U.S.C. § 1255(i)) set out verbatim:

> (i) Adjustment in status of certain aliens physically present in the United States.
>
> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States--
>
> (A) who--

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of--

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000 [enacted Dec. 21, 2000];

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney

General may accept such application only if the alien remits with such application a sum equalling $ 1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act [8 USCS § 1160 or 1255a] or section 202 of the Immigration Reform and Control Act of 1986 [8 USCS § 1255a note] at any date, who—

> (i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act [8 USCS § 1160 or 1255a] or section 202 of the Immigration Reform and Control Act of 1986 [8 USCS § 1255a note];
>
> (ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and
>
> (iii) applied for benefits under section 301(a) of the Immigration Act of 1990 [8 USCS § 1255a note]. The sum

specified herein shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if—

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

(3) (A) The portion of each application fee (not to exceed $ 200) that the Attorney General determines is required to process an application under this section and is remitted to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (o) of section 286 [8 USCS § 1356].

(B) Any remaining portion of such fees remitted under such paragraphs shall be deposited by the Attorney General into the Breached Bond/Detention Fund established under section 286(r) [8 USCS §

> 1356(r)], except that in the case of fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for labor certification, described in paragraph (1)(B) was filed after January 14, 1998, one-half of such remaining portion shall be deposited by the Attorney General into the Immigration Examinations Fee Account established under section 286(m) [8 USCS § 1356(m)].

STATEMENT OF THE CASE

Please read my unfortunate and compelling case. I truly feel that no tribunal prior to my approaching the highest court of this land, has truly taken the time to review my case and the arguments put forth, for if it had, at the very least, that tribunal would have been compelled to hear oral arguments and find in my favor. There are three material facts which are important to point out:

(1) It is material to point out that I have always given my best efforts, successfully, to follow all laws, including the immigration laws of this country. In fact, as is consistent with the law, I applied for lawful permanent residency in the United States while my visa was still current and valid. The visa expired while the application for lawful permanent residency was pending, under 8 U.S.C. § 1255.

(2) It is also material to point out that I was the victim, along with many other immigrants, of an immigration attorney who is currently in jail due to his criminal violations of law, in his immigration law

practice. I want this Court to know that I had no involvement with, nor knowledge of, the illegal activities which occurred. Earlier, in my case, my attorney enclosed the case conviction information.

(3) I am aware that another circuit court sent a case identical to mine back to the Immigration Court to allow the time for the government to process the case. My appellate attorney, Cynthia Groomes Katz, referenced that case in our brief filed in the Fourth Circuit Court.

While the lawful permanent residency case was pending, as required, I reported to United States Immigration and Customs Enforcement in order to participate in *Call-in Special Registration*. As my attorney wrote in *Petitioner's Brief*, filed with the Fourth Circuit, the creators of *Call-in Special Registration* (Special Registration) aimed to identify and register all non-immigrant males, currently living in the United States, who are nationals of a list of 24 Arab/Islamic countries. Following the Special Registration interview, the immigration officer issued to me a Notice to Appear (NTA) in Immigration Court.

In the NTA dated April 7, 2003, Counsel for the government charged that I was deportable because I ". . . remained in the United States beyond June 21, 2000 without authorization from the Immigration and Naturalization Service."[1] Government Counsel further charged that I was subject to removal from the United States pursuant to "Section 237(a)(1)(B) of the Immigration and Nationality Act (Act), as amended, in

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[1] As this Court is respectfully aware, please note that the *Homeland Security Act of 2002*, abolished the Immigration and Naturalization Service (INS) and placed its functions within the Department of Homeland Security (DHS) or the Department of Health and Human Services (DHHS). Pub. L. No. 107-296, Title IV, Subtitles C-F, 116 Stat. 2135 (Nov. 25, 2002).

that after admission as a nonimmigrant under Section 101(a)(15) of the Act, you have remained in the United States for a time longer than permitted, in violation of this Act or any other law of the United States."[2] I wanted to fight these inaccurate allegations and request relief from removal from the United States based on my pending application for Lawful Permanent Residency, in the United States.

Following three continuances, for the purpose of retaining counsel, my trial attorney filed a Motion for Continuance (and legal "Brief in Support of a Continuance for Adjustment of Status under 245(i)") on March 4, 2004.[3] On March 8, 2004, the Immigration Judge (IJ) issued an order denying the motion. At the Master Calendar Hearing on March 17, 2004, my attorney repeated my humble request to continue proceedings, in the form of an oral application.

The Immigration Judge denied my attorney's oral application and the oral motion to reconsider the denial of the motion to continue as well. At that time, my attorney informed the court that she and I would seek an appeal.[4] I, through counsel, filed a timely Notice of Appeal (of the decision denying the motion and ordering removal) with the Board of Immigration Appeals (BIA), on April 13, 2004.[5] On September 07, 2005, the BIA issued a *per curiam* order dismissing the appeal. I, through counsel, filed a timely Petition for Review with the United States Court of Appeals for the Fourth Circuit, on October 4, 2005. On June 29, 2006, the Fourth Circuit denied the Petition for Review, in an unpublished opinion. I,

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[2] Joint Appendix (JA) at 47.

[3] *Ibid.* at 13 and 19.

[4] *Ibid.* at 60.

[5] *Ibid.* at 68-72.

through counsel, filed a timely Petition for Rehearing and the Petition for Rehearing en Banc. On September 11, 2006, the Fourth Circuit denied the Petition for Rehearing and the Petition for Rehearing en Banc. I am continuing on, *pro se*, at this time, seeking justice, in this case before the United States Supreme Court. I am asking this Court to address the problem that it is the government's delay which has prevented me from obtaining my opportunity to apply for lawful permanent resident status in the United States of America.

I beseech you to please not hold my *pro se* status against me. If this Court agrees to hear my case, I do intend to retain my appellate attorney to further argue this case, on my behalf, and to represent me. I need to allocate my limited resources where they would have the most powerful impact.

It is my understanding that federal jurisdiction, in the court of first instance, was based on 8 U.S.C. § 1252(a)(1).

SUMMARY OF THE ARGUMENTS

Adjustment of Status Versus the Ten Year Bar Penalty

I. Consistent with 8 U.S.C. § 1255, it is my humble opinion that the Immigration Judge should not have ordered my removal from the United States because removal based on the US government's backlog places the blame on me, when I gave my all to comply with and to follow the immigration laws of the United States.

II. I am a victim of an attorney who violated legal and ethical boundaries. I trusted that an attorney who had been duly admitted to the Virginia Bar and had been practicing law for many years was one to be trusted to

know the law and to practice law within its boundaries. I believed what he told me-- that because he had met the April 30, 2001 labor certification filing deadline, it was permissible for me to fall out of status and that upon approval of the labor certification, he would be able to file for and seek adjustment of status to that of a Lawful Permanent Resident (LPR) through 8 U.S.C. § 1255(i), on my behalf. The Immigration Judge's denial of the motion to continue precludes the opportunity to take advantage of the protections and benefits provided under the LIFE Act.[6] I believe that beneficiaries, in an employment-based immigrant visa category, where an immigrant visa is quickly or immediately available, are akin to immediate relatives in the family-based immigrant visa category. Therefore, with all due respect, it is my position that the Immigration Judge should have granted a continuance to allow for adjudication at United States Citizenship and Immigration Services (USCIS formerly INS). Should I be removed from the United States now, I would be subject to the "Ten Year Bar"[7] at a minimum. This would cause horrible disruption to my US citizen son's life and bring shame to me and my entire family. I

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[6] 8 U.S.C. § 1255.

[7] "Beginning April 1, 1997, a person who has been unlawfully present in the United States for one year or more consecutively and again seeks admission is barred for 10 years from the date of such person's departure or removal from the United States. 8 U.S.C. § 1182(a)(9)(B)(i)(II). Note, the legislative history clearly provides that departure is necessary to trigger the effects of this section. H.R. Conf. Rep. 104-828, 104th Cong. 2d Sess. at 207. Moreover, admission is expressly defined in the statute as a lawful entry and this provision therefore may not bar an adjustment of status which has traditionally not been considered to be a new entry. The statute also requires departure to be effective because the bar only applies when someone is seeking admission which by definition must be from outside the U.S. Memo, Crocetti, Assoc. Comm. INS, HQ 5015.12, 96 Act .034 (May 1, 1997)." *Immigration Law Sourcebook* Ira J. Kurzban (American Immigration Law Foundation 9th ed. 2004-2005).

am highly educated and prepared to work hard to benefit the United States of America.

The Life Act Offers Protection from the Ten Year Bar

III. The Immigration Judge's denial of the continuance, as well as the affirming of the Immigration Judge's decision, by the Board of Immigration Appeals, violated 8 U.S.C. § 1255(i). Under the LIFE Act, an applicant who is sponsored by a business must first obtain certification from the State Workforce Agency (SWA). The SWA, in turn, is responsible for screening the United States Department of Labor's Employment and Training Administration's (ETA) forms and providing prevailing wage data to employers. From the SWA, the case is transferred to the Backlog Reduction Center:

> At an initial hearing in the removal proceedings, Subhan asked the immigration judge for, and the judge granted him, a six-month continuance to enable him to obtain the necessary certificates. He endeavored - - with all due diligence, so far as appears - - to obtain them; but the wheels of bureaucracy grind slow, and at the end of the six months he had not succeeded in obtaining them and so he sought and was granted a further six-month continuance. Again through no laxity or other fault on his part, the labor departments did not act on his application within the further six-month period. But when, therefore, he applied for a third continuance, the immigration judge turned him down with no explanation beyond saying that while Subhan "may be able to eventually acquire lawful permanent

> resident status by virtue of employment," not having done so as yet he was "not eligible for this form of relief at this time."[8]

Failure to continue removal hearings erodes a respondent's chance to have his/her day in court, in violation of fundamental notions of due process, a cornerstone of fairness and justice, a principle upon which the United States is based.

ARGUMENTS

I have always given my best efforts to always follow the immigration laws Compliance with *Call-in Special Registration* and Prosecutorial Discretion Favored the Issuance of a Continuance in my case

As required by Amended 67 Fed. Reg. 77136, as a native of Bangladesh, I "appear[ed] before, register[ed] with, and provide[d] requested information to the Immigration and Naturalization Service on or before March 21, 2003."[9] I now feel that, but for my compliance with *Call-in Special Registration*, the federal government would not have become aware of my temporary unlawful status. Thus, 8 U.S.C. § 1255(i) policy considerations should override the discovery of my unlawful status as well as any attempt to remove me from the United States until the 8 U.S.C. § 1255(i) process has been allowed to work. I respectfully maintain that by failing to consider the extraordinary circumstances of this particular case, the Immigration Judge made a mistake. My attorneys have told me that the doctrine of favorable prosecutorial

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[8] *Mohammed Subhan v. John D. Ashcroft*, 383 F.3d 591, at 593 (3d Cir. 2005).

[9] 67 Fed. Reg. 77136 (2002). The INS extended that deadline to April 25, 2003 for nationals of the final five countries designated.

discretion provided yet another reason to continue the case. If a beneficiary of an approved immigrant visa petition is to be favored with prosecutorial discretion, then the same standard should apply to a labor certification applicant whose application is still awaiting approval due to administrative delays caused by U.S. governmental backlogs.

My compliance with *Call-in Special Registration*, resulted in disparate impact on my case

But for *Call-in Special Registration* and my compliance in appearing at the legacy Immigration and Naturalization Service, the government would not have become aware of my unlawful status. I ask that U.S. policy considerations should override any attempt to remove me before the 8 U.S.C. § 1255(i) process has been allowed to work. I am aware that the then Immigration and Naturalization Service leadership had issued a memorandum which recognized this issue, and requested that all field offices avoid initiating removal proceedings in situations where such action would be based solely on information provided by the alien seeking to legalize his status under 8 U.S.C. § 1255(i). The Immigration and Naturalization Service leadership noted that "this guidance is intended to ensure that individuals eligible for the benefits of section 245(i) of the INA . . . will not be deterred from initiating the process to legalize their status through fear that their filing will be used to identify and remove them."[10]

At this time, I humbly request that this Court note that the Board of Immigration Appeals failed to address this issue in its decision:

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[10] JA 93-94.

While it may be argued, that the special registration law may arguably serve an important security function, individuals required to register should not have been subjected to a "Catch-22" situation wherein these individuals subject themselves to removability by complying with the law. Looking at my case, it can be argued that an alien's positive and voluntary compliance with this law is an absolute guarantee of subsequent punitive consequences.

Therefore, my compliance with the special registration law should not have been the start for my removal proceedings, particularly when I had a good chance of ultimately qualifying for adjustment of status pursuant to § 245(i).[11]

It is my position that the officer at Immigration and Customs Enforcement (ICE) erred by failing to recognize the complexities and uniqueness of my situation. This error ultimately led to the over zealous issuance of a Notice to Appear – issuance of the Notice was therefore philosophically and procedurally inconsistent with the aforementioned memorandum. Additionally, the trial attorney, representing the government, during the Master Calendar Hearing, apparently declined to exercise favorable prosecutorial discretion during the hearing – where the exercise of favorable prosecutorial discretion would have been philosophically and procedurally consistent with the aforementioned memorandum.[12] Even the Immigration Service, of the US government, as is evidenced by this memorandum, recognizes the imminent and egregious danger and inappropriateness of undermining due process and essentially gutting section 245(i) of the INA.

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[11] *Ibid.* at 94.

[12] *See Ibid.* at 28-29.

Moreover, again, failing to consider the extraordinary circumstances of this particular case, the Immigration Judge held me responsible and punished me for the U.S. government's lack of timeliness and delay. A delay of such epidemic proportion that the government had to create a "Backlog Reduction/Elimination Center" to address the situation – a bureaucratic nightmare, which had gotten out of control.

I was the victim of an attorney who violated legal and ethical boundaries

At issue before this Court is whether the Immigration Judge should be required to grant a motion to continue where the immigrant litigant can show that his own lack of preparation is due to the United States' Department of Labor's processing delay. If so, does that denial without giving a reason consistent with 8 U.S.C. § 1255(i) violate that statute? Failure to continue removal hearings erodes an immigration respondent's chance to have his/her day in court, in violation of fundamental notions of due process. My removal from the United States would, in effect, sentence me to a ten year minimum banishment from the United States, unless I would be eligible for a waiver releasing me from the ten year bar. Thus, I am a victim many times over, the first time, the victim of an attorney who was subsequently convicted of fraud and incarcerated. The second time, a victim of the Department of Homeland Security, because I complied with the law in *Call-in Special Registration*:

> ...[P]rograms like special registration have increased feelings of alienation from mainstream American society among Muslim and Arab communities in the US. Instead of helping to weave Muslims into the fabric of the nation and garner their

> support in anti-terrorism efforts, recent government policies have singled them out *as a group* that is dangerous and suspect, as potential subversives.[13]

I am aware that another U.S. Circuit Court of Appeals reviewed this type of issue and decided in favor of the immigrant litigant

Similar to the petitioner in the Seventh Circuit Court, Mohammed Subhan, I was also ordered removed because I was "not eligible for this form of relief [adjustment of status] at this time."[14] The Seventh Circuit Court held:

> This was not a *reason* for denying the motion for a third continuance, but merely a statement of the obvious: that the labor departments hadn't yet acted. If the immigration judge had said that Subhan had dragged his feet or that it was obvious from the nature of his employment skills that he would not be granted the necessary certificates, or that he should have filed his application for adjustment of status before his tourist visa expired, or that he was a danger to the security of the United States, or that he was engaging in criminal activity or otherwise misbehaving, or even that an alien should not be allowed to delay his removal beyond a year, the denial of the third continuance would have been

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[13] Special Registration: A Fervor for Muslims, Louise Cainkar, Ph.D. 7 *J. Islamic L. & Culture* 73, 99.

[14] The Court in *Mohammed Subhan v. John D. Ashcroft*, 383 F.3d 591 (3d Cir. 2005) quoting the Immigration Judge.

> reasoned, and we may assume would have been consistent with the adjustment-of-status statute. *Hassan v. INS*, 110 F.3d 490, 492-93 (7th Cir. 1997); *Onyeme v. INS*, 146 F.3d 227, 233 (4th Cir. 1998)[.][15]

Aware that this decision, to grant the petition to review and return the case to the immigration authorities, was not binding on the Fourth Circuit, I humbly request that this Court consider the Seventh Circuit's holding and many other circuit courts throughout the nation and find that the Immigration Judge's denial in my case violated 8 U.S.C. § 1255(i).

CONCLUSION

I appeared in Immigration Court pursuant to a Notice to Appear issued by DHS. The Immigration Judge granted continuances to allow me the opportunity to find counsel to represent me in Immigration Court. When represented by counsel, the Immigration Judge denied counsel's motion to continue my case on the grounds that I had no immediate relief available to the Immigration Court.

The decision to deny a request for a continuance nullifies the statutory benefits of 8 U.S.C. § 1255(i).

For all of the reasons and authorities stated in my Petition, I hereby humbly request that the United States Supreme Court grant certiorari, and reverse the underlying judgment in this case.

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[15] *Ibid.* at 593-594.

Respectfully Submitted,
RABIUL ISLAM, Petitioner

/s/Rabiul Islam

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APPENDIX

TABLE OF CONTENTS
TO APPENDIX

Page

Unpublished Opinion of
The United States Court of Appeals
For the Fourth Circuit
entered June 29, 2006 ..... App. 1

Order of
The United States Court of Appeals
For the Fourth Circuit
Re: Denying Petition for Rehearing
entered September 11, 2006..... App. 3

Decision of
The Board of Immigration Appeals
Re: Dismissing Respondent's Appeal
entered September 7, 2005..... App. 4

Oral Decision of
The Immigration Judge
Re: Ordering Respondent Removed from
United States to Bangladesh
entered March 17, 2004..... App. 8

Order of
The Immigration Judge
Re: Ordering Respondent Removed from
United States to Bangladesh
entered March 17, 2004..... App. 11

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-2099

RABIUL ISLAM,
Petitioner,

versus

ALBERTO R. GONZALES, Attorney General,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. (A72-167-546)

Submitted: May 10, 2006
Decided: June 29, 2006
[Entered: June 29, 2006]

Before NIEMEYER, MOTZ, and TRAXLER, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Cynthia G. Katz, LAW OFFICES OF CYNTHIA A. GROOMES, P.C., Bethesda, Maryland, for Petitioner. Peter D. Keisler, Assistant Attorney General, Carol Federighi, James A. Hunolt, Senior Litigation Counsel, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Rabiul Islam, a native and citizen of Bangladesh, petitions for review of a decision of the Board of Immigration Appeals (Board), upholding the immigration judge's ruling finding Islam removable and denying his motion for a continuance of his removal hearing pending adjudication of a labor certification filed by his employer on his behalf. On appeal, Islam challenges the continuance ruling.

"The immigration judge may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29 (2006). Whether to grant such a motion "is within the sound discretion of the immigration judge and is reviewed for abuse of discretion only." Onyeme v. INS, 146 F.3d 227, 231 (4th Cir. 1998). Having reviewed the administrative record, we conclude that the Board did not err in finding the immigration judge acted within its discretion in denying Islam's motion for continuance.

Accordingly, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-2099
A72-167-546

RABIUL ISLAM
Petitioner

v.

ALBERTO R. GONZALES, Attorney General
Respondent

[Entered: September 11, 2006]

On Petition for Rehearing and Rehearing En Banc

Petitioner's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Motz, and Judge Traxler.

For the Court,
/s/ Patricia S. Connor
CLERK

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Dept. of Homeland Security, OCC/W
901 North Stuart St., Suite 1307
Arlington, VA 22203

Name: ISLAM, RABIUL **A72-167-546**

Date of this notice: 09/07/2005

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Frank Krider
Frank Krider
Chief Clerk

Enclosure

Panel Members:
FILPPU, LAURI S.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A72 167 546 – Arlington Date: [SEP – 7 2005]

[Entered: September 7, 2005]

In re: RABIUL ISLAM

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Cynthia A. Groomes Katz, Esquire

ON BEHALF OF DHS: Maryellen Meymarian
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Continuance

ORDER:

PER CURIAM. The respondent has appealed the Immigration Judge's March 17, 2004, decision finding the respondent removable as charged and denying his request for a continuance of his removal hearing pending

the adjudication of a labor certification filed on his behalf by an employer.

We find no error with the Immigration Judge's decision denying the respondent's motion for a continuance. The respondent was not prima facie eligible for any form of relief when he sought a continuance in order to obtain an approved I-140 visa petition to qualify for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). Moreover, we note that approval of a labor certification is no guarantee that an employment visa petition will be approved. The fact that the regulations and Department of Homeland Security policy allow for the concurrent filing of visa petitions and adjustment applications does not require an Immigration Judge to hold proceedings open indefinitely based on the possibility that the respondent may, at some point in the future, become eligible for adjustment. The respondent is not presently eligible for adjustment of status, and he did not show good cause warranting a further continuance. *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996); *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987); 8 C.F.R. §§ 1003.29, 1240.6 (2005). In this regard we note that to date, over 17 months after the motion to continue was denied, there is no evidence that the labor certification has been adjudicated. In his appeal brief, the respondent argues that the holdings in *Bull v. INS*, 790 F.2d 869(11th Cir. 1986) (holding that an Immigration Judge erred in not granting a continuance where an alien was the beneficiary of a pending immediate relative spousal visa petition) and *Matter of Velarde-Pachedo*, 23 I&N Dec. 253 (BIA 2002) (holding that, in certain circumstances, a properly filed motion to reopen for adjustment based on a marriage entered into after the commencement of proceedings may be granted in the exercise of discretion, where a visa petition has been filed but not approved), should be extended to cover bona fide employment-based

petitions. However, we find these cases, involving marriage-based visa petitions, inapplicable to the respondent's employment-based petition, and decline to extend our holding in *Matter of Velarde-Pachedo*, *supra*, to situations involving employment-based petitions. Accordingly, the appeal is dismissed.[1]

/s/ Lauri S. Filppu
FOR THE BOARD

[1] If the labor certification is approved, the respondent is free to file a motion to reopen in accordance with the regulations governing such motions.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Arlington, Virginia

File No.: A 72 167 546 March 17, 2004

[Entered: March 17, 2004]

In the Matter of	)	
	)	
RABIUL ISLAM	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Immigration and Nationality Act – Section 237(a)(1)(B) – remaining in the United States for a time longer than permitted.

APPLICATIONS: Motion for a continuance to have a labor certification approved.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Charolotte Kahn	Deborah Todd

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is an adult native and citizen of Bangladesh. The respondent was admitted to the United States on December 22, 1999 as a nonimmigrant with authorization to remain in the United States for a temporary period not to exceed June 21, 2000. The respondent remained in the United States beyond June 21, 2000 without authorization. Accordingly, I make a finding by clear and convincing evidence the respondent

has violated Section 237(a)(1)(B) of the Act. The respondent has a labor certification pending, which has not been approved. This Court is not going to grant the continuance since, at this point, the respondent has no relief available to this Court. The respondent has asked for no other forms of relief.

Accordingly, I order the respondent removed from the United States to Bangladesh on the charge contained on the Notice to Appear.

/s/ Wayne R. Iskra
WAYNE R. ISKRA
Immigration Judge

[1-31-05]

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE WAYNE R. ISKRA, in the matter of:

RABIUL ISLAM
A 72 167 546
Arlington, Virginia

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Terri L. Marshall
Terri L. Marshall,
Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

January 3, 2005
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

IMMIGRATION COURT
901 NORTH STUART ST., STE. 1300
ARLINGTON, VA 22203

In the Matter of Case No.: A 72 167 546

ISLAM, RABIUL IN REMOVAL PROCEEDINGS
Respondent

[Entered: March 17, 2004]

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on .

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in this case.

[X] The respondent was ordered removed from the United States to [BANGLADESH]
or in the alternative to

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to alternative to

[ ] Respondent's application for voluntary departure was granted until
upon posting a bond in the amount of $_____
with an alternate order of removal to

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: [Motion for a continuance was DENIED].
Date:
Appeal: Waived Reserved Appeal Due By:
[Respondent] [April 16, 2004]

/s/ Wayne Iskra
WAYNE ISKRA
Immigration Judge

[3-17-04]

BE1

ALIEN NUMBER: 72-167-546

ALIEN NAME: ISLAM RABIUL

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P)

TO: [X] ALIEN [ ] ALIEN c/o Custodial Officer
[ ] ALIEN's ATT/REP [X] INS

DATE: [MAR 17 2004] BY: COURT STAFF [CG]

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other

Q6